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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
Petitioner,

v.

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

1. Contrary to the underlying premise of opponents' briefs, this is not a case of federal intrusion into an area of State prerogative in the existing structure of federal-state relations.

The instant case, unlike *National League of Cities v. Usery*, 426 U.S. 833, does not concern itself with functions like fire prevention or police protection, which have historically been recognized to be the responsibility of local government. Here the concern is with a railroad, and more specifically with the proposed displacement of federal railway legislation long applicable to the Long Island Railroad and not disputed until fourteen years after it was acquired by the State of New York.

The long history of the American railroad industry and of government involvement in that industry is dis-

cussed in Petitioner's Brief (hereinafter designated "Pet. Br.") at 23-31. The crucial aspects of that history, in the instant connection, are that the ownership and operations of interstate railroads of all kinds—freight, passenger, and commuter—have predominantly been in the private sector, and that government involvement has at all times been the province of the federal government, taking the form of a wide variety of statutes enacted under the Commerce Clause. The "consistent congressional pattern in railway legislation which preceded the Railway Labor Act was to employ all-inclusive language of coverage with no suggestion that state-owned railroads were not included," and this Court has held that Congress followed that pattern in the Railway Labor Act, intending to extend its provisions to all interstate railroads, private and public. *California v. Taylor*, 353 U.S. 553, 564.

2. When the State of New York in 1966 acquired and began to operate the Long Island Railroad, this pre-existing body of federal regulation was not imposed upon the new owner by reason of its Statehood. The State had chosen, rather, upon policy considerations of its own, to enter into a field long settled to be constitutionally subject to such regulation. It had taken over a railroad that had "historically considered itself a 'carrier' within the meaning of the [Railway Labor] Act, the Interstate Commerce Act, . . . and related statutes" and had "consistently filed reports required by the Interstate Commerce Act with the ICC" and whose employees had "consistently received the benefit of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employers' Liability Act." (Findings, Appendix to the Petition (hereinafter designated "Fdgs., Pet. App.") at 35a-36a). Even after the takeover, the State made no change in this regard, the LIRR continued to characterize itself as "a Class I steam railroad . . . engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce" (Pet. Br., at 8, 9). Indeed in the very dis-

pute "which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the [Railway Labor] Act, including the establishment of a Presidential Emergency Board" (Fdgs., Pet. App. at 36a).[1]

New York made no change in its posture in this regard until fourteen years after it acquired ownership, when on February 8, 1980, in the course of the instant litigation, it undertook to substitute New York labor law for federal labor law by transforming the LIRR from a private stock company to "a public benefit corporation whose employees would [for the first time] be facially subject to the Taylor Law" (Fdgs., Pet. App. at 31a). The railroad's "essential character within this context" was not changed by this "simple expedient of reorganizing its corporate structure under state law" (Fdgs., Pet. App. at 36a).

On this record, respondents cannot now reasonably contend that "Congress has interposed a Federal regulation which commands New York to apply to a transit service [the LIRR] . . . procedures designed for and best suited to privately-owned railroads or airlines." Respondents' Brief (hereinafter designated "Resp. Br.") at 15. New York chose to acquire and operate a railroad that was subject to those very procedures. The existence of those procedures was an intrinsic aspect of the field the State chose to enter; it was not a diminution of the State's freedom to decide but a consideration to be evaluated by the State in making its decision.

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[1] And, of course, the LIRR continues to seek rate adjustments under the Interstate Commerce Act. *See* ICC *Ex Parte* No. 299 (Sub. No. 1), Increases in Freight Rates . . . of the LIRR and No. 36874 (1981), *appeals docketed*, No. 81-4139 (2nd Cir., Aug. 7, 1981) and No. 81-4306 (5th Cir., Aug. 7, 1981); and Application for a Staggers Act Surcharge, filed with the ICC, on September 12, 1981, under same style. *See also*, in connection with these ICC proceedings, *LIRR v. Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1.

3. At the heart of respondents' argument is the expressed assumption that immunity under the Tenth Amendment "must turn on the fundamental dependence of the public on the service involved" (Resp. Br., at 11 and *passim.*). The assumption is erroneous and rests on a distortion of *National League.* The test laid down in *National League* is not whether the activity in question is essential to the public, but whether it is essential to the existence and functioning of the State as a State (426 U.S. at 845 and *passim.*). The community's need for a particular economic service may properly move a State to remedial action—by regulation, subvention, promotion, tax remission, or even direct provision of the needed service. But when the State chooses the last mentioned course, and enters into an activity traditionally the function of private business, it does not thereby endow that activity with the aura and immunities of sovereignty. *Cf. Helvering v. Powers*, 293 U.S. 214, in which the City of Boston's need for adequate local transportation was held not to prevent application of the federal tax laws to a publicly operated street railway, since the provision of that service by the State was "distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State" (*id.*, at 227). *Cf.* also *Ohio v. Helvering*, 292 U.S. 360, 368, 371.

This distinction is stressed throughout *National League*, which repeatedly equates the functions that are immune from Commerce Clause regulation with those that are the activities of "States *qua* States" and are "essential to [the States'] separate and independent existence" (*e.g.*, at 845, 847, 851, 852). *See also Hodel v. Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981). *And see Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 423, 424 (conc. op. of the Chief Justice):

> The *National League of Cities* opinion focused its delineation of the "attributes of sovereignty" . . . on a determination as to whether the State's interest involved "functions essential to [its] separate and independent existence.'" [citation omitted] It should be evident . . . that the running of a business enterprise [and hence "the supplying of electricity"] is not an integral operation in the area of traditional government functions.

Respondents' metaphor "life blood of the community" is no more apropos of passenger railroad service than of the "supplying of electricity" in *Louisiana Power* or of the many services upon which our local communities are dependent—among others, the distribution of gas, oil, and other forms of energy, the provision of food and drugs, and the utilization of communication channels. All are subject to a variety of federal programs necessarily requiring nationwide application without differentiation between public and private ownership. *Cf. Bus Employees v. Wisconsin Board*, 340 U.S. 383, holding that "federal labor legislation, encompassing as it does all industries 'affecting commerce,'" overrides state public utility policies designed to ensure an uninterrupted supply of "'essential public utility service,'" including among such services: "water, heat, gas, electric power, *public transportation*, and communications" (at 388, 391, emphasis added).

Respondents themselves concede, in distinguishing *United States v. California*, that federal regulation would be constitutionally permissible if the LIRR were exclusively engaged in the carriage of freight (Resp. Br., at 23). Yet the freight operations of a railroad—the carriage of coal for industrial and domestic purposes, of raw materials to keep factories operating, of finished products to keep businesses moving, of mail to complete the communications network—are surely as essential to the economic life of the community as is the transportation of passengers. Clearly, the respondents' test—public dependence on the particular service—goes too far. The correct test,

confirmed by *National League*, is not whether the public needs the State to operate the railroad, but whether the State needs to operate the railroad in order to be a sovereign State.[2]

4. Concededly, the term "traditional government functions," as used in *National League*, obviously is not limited to functions which the States performed in 1789. It is equally clear that the word "traditional" loses its meaning when stretched to cover surveys of "competing demands for essential services" by any given State government at any given time, as respondents contend (Resp. Br., 26 and *passim*).

The Court's repeated reference to the "traditional" recognition of an activity as an integral governmental function cannot, as respondents' would have it, be cavalierly dismissed as having no reference to time or custom (Resp. Br., at 11, 12). The heavy stress in *National League* on the "traditional" functions of State government must be read to reflect an historical perspective, one which looks not to the current importance of the activity to the public, but to its standing under time-honored and well-rooted conceptions of the essential nature of State government within the federal-state system. While a function unknown in 1789 may come to be traditional after a sufficient period of widespread, consistent integration by the various states into the core prerogatives of state governments, as in the case of fire protection and police protection, this is hardly the case with railroads, freight or passenger, as appears from the discussion of the history and current structure of the railroad industry (Pet. Br., at 23-31). No matter how broadly the term is

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[2] Respondents' "public dependence" argument fails also in that it is based upon the special conditions asserted to prevail in the New York City area. But the question presented by this case is one of the limits of federal power. There cannot be one rule for the City of New York and others for other localities. "The needs of the subject matter manifestly call for uniformity." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 349 U.S. 369, 381.

read, a "tradition" cannot be created by the action of a single State with respect to a single railroad, upon a theory belatedly asserted in connection with a particular law suit and maintained only with respect to the particular statute upon which that litigation is based.

5. In short, *National League* speaks not in terms of fundamental dependence of the public on the service involved but in terms of services "in an area which the States have regarded as integral parts of the governmental activities" (*id.*, at 854, n.18). Respondents have not shown that the States have ever so regarded the operations of railroads engaged in the transportation of freight and of passengers. The contrary is true. All commuter railroads of this character, whether privately owned and privately operated, publicly owned and privately operated or, as in New York, publicly owned and publicly operated, have at all times considered themselves subject to the Railway Labor Act, the Railroad Retirement Act, the Interstate Commerce Act, and all of the other federal railroad laws, except for the rare challenges in particular connections rejected by the Courts, as in *California vi Taylor*, 353 U.S. 553, and *United States v. California*, 295 U.S. 175. New York alone began to deviate from this pattern during the course of this litigation and its deviation has been limited to the single subject of labor relations. In all other respects New York still regards LIRR as a railroad subject to federal railroad laws. *See Long Island Railroad v. Aberdeen & Rockfish Railroad Co.*, 439 U.S. 1, in which LIRR was the petitioner before this Court.

6. In sum, there is no substance, we submit, to respondents' contention that the States have a sovereign right, superior to that of the United States, to use *on their own terms* a railroad which, although heavily engaged in carrying passengers, is also, in the words of the Court below, "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App., at 9a). The paramount purpose of the

Commerce Clause is to grant the United States the authority the Confederation lacked to take all steps necessary and proper to establish and maintain an integrated nationwide economic system (*See particularly* Mr. Justice Jackson's discussion of the Commerce Clause in *Hood & Sons v. DuMond*, 336 U.S. 525, 532-534). As has been recognized from the beginning, the very core of that authority is the superintendence of the means of transportation by which interstate commerce moves throughout the Nation (*See, e.g., Gibbons v. Ogden*, 9 Wheat. 1). Whatever may be the rule in other respects, certainly when the question is the primacy of the competing claims of the United States and a State to regulate "common carriers by rail in interstate commerce," it "is not a controversy between equals . . . [; and] the interests of the Nation are more important than those of any State" (*Sanitary District v. United States*, 266 U.S. 405, 425-426).

> The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. [*Houston E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342, 351.]

The result must be the same whether or not the interstate carrier is owned by a state and whether or not that carrier performs important local functions in addition to its interstate freight activity.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.[8]

Respectfully submitted,

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[8] The issue whether city trolleys, buses, and subways are within the area that States have traditionally regarded as integral parts of their governmental activities is not presented by this case, in which we deal with an interstate railroad. It is difficult to conceive of any other American industry that has been so thoroughly regulated by federal law over so long a period as the "railroad world" which this Court has described as "a state within a state" . . . [with] its own customs and its own vocabulary, and . . . rules of its own making" (*California v. Taylor*, 353 U.S. at 565).

The question as to city transit is moreover directly presented in a case noticed for appeal to this Court (*San Antonio Metropolitan Transit Authority v. Donovan*, Civ. A. No. SA-79-CA-457, (W.D. Tex., Nov. 17, 1981, *notice of appeal filed*, Dec. 16, 1981), and in several other 1981 decisions in which appeal proceedings are pending in the Courts of Appeals. *Kramer v. New Castle Area Transit Authority*, Civ. A. No. 80-1108G (W.D. Pa., June 11, 1981), *appeal docketed*, No. 81-2223 (3d Cir. Aug. 10, 1981); *Dove v. Chattanooga*

Area Regional Transportation Authority, Civ. A. No. 1-80-249 (E.D. Tenn. July 21, 1981), *appeal docketed*, No. 81-5636 (6th Cir. Sep. 2, 1981); *Alewine v. City Council of Augusta, Georgia*, 505 F. Supp. 880 (S.D. Ga. 1981), *apeal docketed*, No. 81-7490 (5th Cir. June 5, 1981); *see contra, Joiner v. City of Macon*, Civ. A. No. 79-287-MAC (M.D. Ga. April 24, 1981), *request for permission to appeal filed* (5th Cir. June 14, 1981). The records developed in those cases will doubtless be particularly directed to considerations pertinent to mass transit and will present the appropriate vehicles for consideration of the application of the Tenth Amendment in that area.

We note, however, that it was the national government, not the State governments, which initiated the steps by which a stronger governmental role in the movement of masses of people in urban areas began to develop. Prior to the enactment of the Urban Mass Transportation Act in 1964, 49 U.S.C. §§ 1601, *et seq.*, city trolleys and buses were traditionally regarded as private sector business activities. See American Public Transit Association, *Transit Fact Book* (1978-1979, ed., at 55). Municipal ownership began at that time with heavy federal financial support, originally providing capital and later providing operating funds, subject to federal policies covering planning and manpower, including collective bargaining. The strong role of the federal government in this field has continued to this day. It is only in recent months that the federal-state roles in mass transit are undergoing re-examination by the Federal Department of Transportation. *See* 46 *Federal Register* 61531 (Dec. 17, 1981). Recent surveys indicate that federal withdrawal from its mid-century role in this respect may impair the States' ability to structure its operations in this area, the exact reverse of the *National League* criteria for immunity. *See New York Times*, Jan. 4, 1982.